

## EXHIBIT “E”

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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ALBERT E. PERCY,

Plaintiff-Appellant,

AFFIDAVIT

JOHN MERCADO, MANUEL MEJIA, FIGHT  
BACK, NATIONAL ASSOCIATION FOR THE  
ADVANCEMENT OF COLORED PEOPLE,

Case No. 17-2273

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF  
LABOR, ALEXANDER ACOSTA, UNITED  
STATES SECRETARY OF LABOR,  
PATRICIA A. SHIU, FEDERAL  
CONTRACT COMPLIANCE, NANCY  
ROONEY, UNITED STATES DEPARTMENT  
OF LABOR - MANAGEMENT STANDARDS,  
ANDREW MARK CUOMO, GOVERNOR OF  
THE STATE OF NEW YORK, ROBERTA  
REARDON, NEW YORK STATE DEPARTMENT  
OF LABOR, BUILDING AND CONSTRUCTION  
TRADES COUNCIL OF GREATER NEW YORK,  
NEW YORK STATE DEPARTMENT OF LABOR,  
NEW YORK BUILDING AND CONSTRUCTION  
INDUSTRY BOARD OF URBAN AFFAIRS  
FUND, NEW YORK PLAN FOR TRAINING,  
INC.,

Defendants-Appellees.  
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STATE OF NEW YORK     )  
                              ) ss.:  
COUNTY OF NEW YORK    )

Albert E. Percy being duly sworn, deposes and states:

1. I make this affidavit upon personal knowledge. I reside  
at 119-09 232 Street, Cambria Heights, Queens, NY 11411-2223, where  
I own my residence and am an active registered voter in election

district 70 in Queens, the same residence on my New York State driver's license ID 976 584 249.

2. I am the Class Representative in the above captioned lawsuit *Percy v. Brennan*, 3 Civ. 4279; File # 41415384 (S.D.N.Y.) (filed 10/9/1973) (the "Percy Action") where I continue in that capacity, representing the class of all black and Spanish-surnamed persons who are capable of performing, or capable of learning to perform, construction work, and who wish to perform construction work.

3. I have retained the Kernan Professional Group, LLP to represent me in the Percy Action. James M. Kernan, of counsel, appearing before the Judicial Panel on Multidistrict Litigation and in the Eastern District of New York Federal Court, Barry R. Feerst and Leighton R. Burns, of counsel, appearing in the Southern District of New York Federal Court, substituting for Dennis R. Yeager Esq., now deceased, who was Plaintiff's appearing counsel in the Percy Action.

4. As far as I know, the Percy Action is still active and should be, Judge Lasker never dismissed or disposed of the Percy Case. He stated that if further proceedings become necessary or desirable that any party may initiate the same.

5. The Court has never approved that the Percy Action be settled, dismissed or compromised. The Percy Action remains open and active because the following procedures did not occur:

(a) I received no notice from the Court binding myself and the Class members of any disposition of my lawsuit.

(b) As far as I can determine, the court relied upon a proposal by the State of New York ("State") in the form of Executive Order 45 presented to Judge in Lasker in 1977 in discontinuing my lawsuit, but the Court made no findings binding upon me or my Class members that it was after a hearing "fair, reasonable, and adequate", which it turns out the proposal was not and I would have objected given the opportunity.

(c) As far as I know the parties who sought approval of the proposal did not file a statement identifying the agreement made in connection with the proposal disposing of the issues in my lawsuit.

(d) Because the class action was previously certified by Judge Lasker, the court had to afford a new opportunity to request exclusion to individual class members, and it did not.

(e) Neither I nor the Class members I represent were afforded the opportunity to object to the proposal that required court approval, and if we had that opportunity, the objections, the same objections described herein, could only be withdrawn with the court's approval.

6. What I seek is what was awarded to me. I'm not blaming anyone mind you, I have gone on for years knowing something is wrong, and now I discover that I am considered moot. For me, this

is not a joke or some political situation. It's as if there is a strange disease that appears to affect black men. You begin to wonder about yourself, but I stupidly lived on in an urban community where forces of disengagement are more formidable, the resources for battling them more limited, and where lack of skills is the core of disparity, but I lived, as I must, being a mere pawn in a futile game.

7. So, after many years I finally got my courage up and sought to regain the relief promised to me by Judge Lasker so many years ago.

8. My career started out with my share of optimism, believing in hard work with a world of infinite possibilities. I remember my start was in the oil fields of Trinidad as a casual laborer. The job training was working alongside an experienced craft person who was able and willing to transfer their know-how to inexperienced, although enthusiastic, apprentices like me. The apprentice learns by doing the tasks of the craft. I was beginning to pick up work as a teenager with Halliburton Industries and its local presence with Tucker. I was an assistant to a drill rig operator as a casual laborer roughneck. I also worked as an auto mechanic, using the tools of the trade, often times under challenging conditions without modern vehicle lifts or pneumatic tools, repairing engines, clutches and breaks alongside an experienced mechanic. When it came time to repair broken metal I

was taught to weld learning how to draw a bead, fuse welding rods to adjacent metal pieces with the heat of electric arc, and joining dissimilar metals by brazing.

9. When I arrived in New York City in April 1966, I registered for the draft at 42<sup>nd</sup> Street in New York City. I was inducted into the United States Army at Whitehall Street in New York City in July 1966 and shipped to US Army boot camp at Fort Jackson SC. I reported to Fort Bragg, NC for Advanced Infantry Training. I served in the U.S. Army from 1966 to 1968, during the Vietnam era, rising from Spec E4 to the rank of Sergeant E5, providing leadership training to 2nd Lieutenants from West Point OCS and ROTC at Fort Knox, KY to prepare them for the war zone.

10. After my honorable discharge from the United States Army on July 21, 1972, I took a job with J.P. Morgan Chase Bank as a transaction clerk. But I was young and was looking for more physical work so I took a New York City wide exam and was hired on with the New York City Sanitation Department as a mechanic at the Center of Repair Services in Maspeth, New York. I took a further examination and was promoted to Senior Auto Worker. I then took the oiler examination and was hired at the 26th Ward Wastewater Treatment Plant and began working as an oiler which was the beginning of my career in the sanitation and water pollution plants. At the 26th Ward, I was promoted to the position of Stationary Electrical Engineer and worked under supervisor Walter

Boritz and later under Superintendent Garibaldi. I then became the Chief Oiler at the North River Water Pollution Control Plant, making sure the plant was maintained and removed pollutants from used water before being discharged into local New York City waterways. My service extended for 25 years working in sewer plant facilities with pumps and electrical gear as an Oiler, as a Stationary Electrical Engineer at the 26th Ward Pollution Plant, and as an Oiler at Coney Island Pollution Plant, Owls Head Pollution Control Plant, and North River Water Pollution Control Plant, North River sticks with me the most because that is when I was able to save the life of my coworker, Brian Malunut, from drowning in a sewage influent vat. I remember him shouting "I am sinking". With over 9 feet to the bottom, the filth and human waste was filling his boots pulling him towards the 2 foot grinder blades where all of the influent and Malunut would be ground into smaller pieces. He was hanging onto the firehose that he fell in with. He said: "Percy, please help me, don't let me die this way", indeed a grizzly death it would have been if he had not been rescued. I took care of my coworkers and demanded workplace safety. Throw in the plum bob to the sewer tanks and it'll scarcely reach bottom. There will always be a dark swirling pool of the wastes of society to which everyone, whether they realize it or not, is connected-the ubiquitous device called a toilet.

11. I was grateful that I found work and it was meaningful work. The water pollution treatment plants I worked at made me the barrier and interface between modern industrial, manufacturing, commercial and residential society and its waste and excrement, and our planet, its natural resources and its waterways. My difficult and dirty chores in excrement stench confined spaces, shoveling and mopping terrible wastes was so that only clean water, a continuous and life sustaining resource, returned to nature, right back into the environment and into the homes of the living. I worked through the dusty air at the facilities, at times feeling as though I was mentally drowning in the waste flooded bowels of the city of New York, produced by upstream living. I've anguished on why I hadn't simply left and since I remained and waited, why I had not done something to assert myself? Day after day I functioned with water, water everywhere. I did the best I could while the authorities and powers that held my future, made no effort to help me. I remained like a underground vermin, making a daily descent into the working bowels of the city.

12. Everyone is connected to the steady flow into the sewers and equally connected to the outflow of cleansed water running out. And while society stands (or sits) unaware, on both ends of the input and output, there is an unseen constant interface which keeps the flow between modern society and our planet moving, people like me. We are the machinery that allows urban modern



living to coexist with the natural elements of our world, earth and nature. The ever evolving purification of water increased the life expectancy and elimination of many diseases at its beginning and helped create and grow cities and industries. I am what society relies upon! And yet I kept my eyes lowered, mumbling, "Pardon me, pardon me," all the while in the many years that I waited for the promised training. I waited, insignificant and yet part of something so significant.

13. I never got what I was promised. In 1973 in my landmark Percy Action I won the right for unskilled workers to receive training so they could benefit from good jobs while enjoying the pride that comes from building and maintaining critical infrastructure. Skills are the key to freedom and liberty. Despite a favorable ruling, the training never happened. I speak for the Class and I was denied.

14. The trade that I sought to apprentice in was a heavy equipment, operating engineer. When I sought apprenticeship training as a heavy equipment operator I was directed to a Mr. Daniel Murphy who was associated with the New York City Building Trades Association. Murphy advised me to look into becoming an apprentice, but I had no success.

15. Since the decision of Judge Lasker in the Percy Action, there has been virtually no meaningful training, enabling the equal employment opportunity envisioned by Pres. Lyndon Johnson upon the

signing of the Civil Rights Act of 1964 and the adoption of Presidential Executive Order 11246.

16. In the Percy Action I sought to be admitted into the apprenticeship program for myself together with the thousands of persons identified by Judge Lasker in 1974 as the Class. I have conferred with my attorneys and their staff at Kernan Professional Group, LLP, and have been advised and now understand that this apprentice training is established and provided pursuant to the Fitzgerald Act of 1937 (the National Apprenticeship Act of 1937), the same laws which have been cited in the Evans case, to which my attention has been directed.

17. I am personally very familiar with the disparate treatment in employment of the Class that I represent when I commenced the lawsuit to remedy and rectify my inability to get into the skilled trades. I am knowledgeable that this cause of action is grounded on rights codified in the 1991 amendments to section 2000(e) (Title VII of the Civil Rights Act of 1964). It is the same remedy I sought in my lawsuit representing the Percy Class.

18. The training that the Percy Class was and is seeking is apprenticeship involving on-the-job training coupled with related classroom instruction.

19. I am aware that apprenticeship under the National Apprenticeship Act of 1937 can occur through an Alternative

Employment Practice and enrolling the new workforce to work alongside existing journey persons will grow the depth of skilled workers whose ranks are being diminished through age and attrition.

20. The State has violated and continues to violate statutory and common laws the 28 U.S.C. §1343, Civil Rights Act of 1964, and specifically the 1991 amendment 42 U.S.C. §2000e-2 and §2000d and in breach of the conditions to grants of funds from the United States of America ("Federal Funds") and of rights secured by the Fifth and Fourteenth Amendments to the United States Constitution, 42 U.S.C. §§1981, 1983 and 1985, and has failed to implement regulations and executive orders which guarantee the right to equal employment opportunities under the Civil Rights Act of 1964 and as amended in 1991 by failing to adopt and/or otherwise implement an alternative employment practice ("Alternative Employment Practice") and in not properly utilizing the Federal Funds to legally and effectively provide equal employment opportunity in paid on-the-job-apprentice training ("OJT") and employment.

21. The elements of a prima facie cause of action for violation of 42 U.S.C. §§2000e et al exists, depriving rights thereunder, secured to the Plaintiff Class as the Complaining Party by the 5th and 14th Amendments to the United States Constitution, 42 U.S.C. §§§ 1981, 1983, 1985, and United States Executive Order 11246.

22. The Class as the "Complaining Party" under the 1991 Amendment to the Rights Act of 1964, has "demonstrated" an "alternative employment practice" to alleviate disparate impact, which the government agencies "refuse[s] to adopt such alternative employment practice" referred to in this ligation as the Alternative Employment Practice, warranting the Court provide relief to the Class Complaining Party, the Class found by Judge Lasker so many years ago.

23. The 1991 amendment to the Civil Rights Act of 1964, as amended in 1991 at 42 U.S.C. §§2000e, is for all intents and purposes an affirmative action plan as contemplated by Executive Order 11246 and the Civil Rights Act of 1964 with its constitutional authority arising out of the Fifth and 14th Amendments to the US Constitution and 42 USC 1983, such that it accomplishes the affirmative action contemplated by the State's Executive Order 45. The office of contract affirmative action contemplated by the State's Executive Order 45 is nowhere in any meaningful form. Once Executive Order 45 was declared illegal and unenforceable, the Executive Branch of the Governor's office and its agencies of the State went flat, not even notifying the Percy Class that the solution it presented and was relied upon by Judge Lasker and Percy was gone. Fortunately, the Percy Class, by its own self help and determination, has proceeded and is still entitled to the affirmative action and equal employment

opportunity, such is the purpose of the Alternative Employment Practice.

24. The relief is the "Solution", the Alternative Employment Practice described here.

25. The Percy Class presented the Solution(s) to Lash Green, Diversity Officer of the Port Authority, and to past Executive Director Chris Ward proposing that the Port Authority adopt and sponsor the Solution but the Port Authority has remained apathetic to the plight of the Class and have not taken steps to correct the disparate treatment to the Class.

26. The Percy Class presented the Solution to Michael J. Garner, Chief Diversity Officer of the MTA, proposing that the MTA adopt and sponsor the Solution but the MTA has remained apathetic to the plight of the Class and have not taken effective steps to correct the disparate treatment to the Class.

27. The Percy Class presented the Solution to ESDC director and the Deputy Commissioner for Community Economic Development, for presentation to Gov. Andrew Cuomo proposing that the ESDC adopt and sponsor the Solution but the ESDC has remained apathetic to the plight of the Class and have not taken effective steps to correct the disparate treatment to the Class.

28. The Percy Class presented the Solution to DASNY Diversity Officer Paul Williams, proposing that the DASNY adopt and sponsor the Solution but the DASNY has remained apathetic to the plight of

the Class and have not taken effective steps to correct the disparate treatment to the Class.

29. The Percy Class presented the Solution to Governor David Patterson at a meeting arranged by Clemmie Harris, proposing that the State of New York adopt and sponsor the Solution but the DASNY has remained apathetic to the plight of the Class and have not taken effective steps to correct the disparate treatment to the Class.

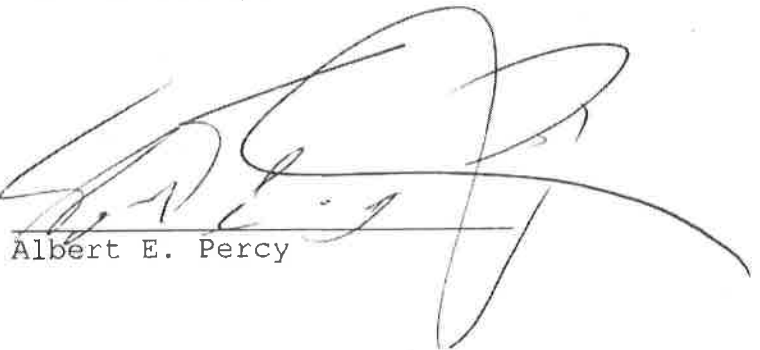
30. The Percy Class presented the Solution to School Construction Authority proposing to acquire a qualified General Contractor to be the Sponsor of the Apprenticeship Program and OJT through Monitor Thacher & Associates proposing that the School Construction Authority and MTA adopt and sponsor the Solution but the School Construction Authority and the MTA have remained apathetic to the plight of the Class and have not taken effective steps to correct the disparate treatment to the Class.

31. The Percy Class presented the Solution to Chairman Carl McCall of the State University of New York for presentation to state Government Agencies for the State University of New York to partner with us to provide the Solution, proposing that state Government Agencies adopt and sponsor the Solution but the State has remained apathetic to the plight of the Class and have not taken effective steps to correct the disparate treatment to the Class.

32. The Solution was presented to the U.S. Department of Labor Employment Standards Administration for review in 1984 and was accepted on June 14, 1984 as an appropriate apprenticeship program for Wage and Hour Davis-Bacon purposes as qualifying under the US Department of Labor Bureau of Apprenticeship Training.

33. The Solution was registered with the New York State Department of Labor effective January 1, 1991 which registration has never been revoked and has been approved by the New York State Department of Education to provide related classroom instruction to the OJT.

34. Even though my skin is black, I pray to be free to compete for jobs based on my skills rather than special treatment because of the color of my skin or ethnicity.



Albert E. Percy

Sworn to and subscribed before me this 7th day of November, 2017.



Notary Public

REBECCA CARAVAGLIO  
Notary Public, State of New York  
No. 43-4993626  
Qualified in Richmond County  
Commission Expires March 23, 2018